A

AMASIFUEN TELLO REYES

v.

PP

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COURT OF APPEAL, PUTRAJAYA
JEFFREY TAN JCA
BALIA YUSOF WAHI JCA
MOHTARUDIN BAKI JCA
[CRIMINAL APPEAL NO: W-05-28-2009]

C

20 JUNE 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Conviction and sentence - Appeal against - Whether appellant was in transit to Singapore and was not trafficking in*

D

dangerous drugs in Malaysia - Dangerous Drugs Act 1952, s. 21(6) - Whether applied - Whether traceability or availability of witness a ground for invocation of s. 114(g) Evidence Act 1950 - Whether prosecution bound to call all witnesses involved in a particular case - Whether appeal to be dismissed

E

WORDS & PHRASES: *"in transit" - Meaning of - Dangerous Drugs Act 1952, s. 2*

The appellant was charged in the High Court for the offence of trafficking in dangerous drugs under s. 39B(1)(a) Dangerous Drugs

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Act 1952 ('the Act'). The appellant, a Peruvian, suspected to be a drug dealer, arrived in KLIA in the early morning of 15 May 2007. The appellant was seen boarding a taxi and was followed by SP1 and his team. At Jalan Sultan, Kuala Lumpur, the taxi stopped and SP1 and his team arrested the appellant. When the

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appellant was first searched, nothing incriminating was found. The appellant was then brought to the Kuala Lumpur Hospital to be x-rayed and the results showed the presence of several capsules in the appellant's stomach. The appellant was detained in order for the capsules to be expelled from the appellant's body.

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Altogether 114 small packets were collected which were analysed by the government chemist (SP5) and found to contain 714 grammes of cocaine. According to the appellant, he had stopped in KLIA on transit and had taken a taxi to Kuala Lumpur in order to see the KLCC twin towers. After he was shown the twin

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towers, the appellant submitted that the taxi driver had demanded another RM200 to go back to the airport. He then came out of

the taxi where he was arrested and handcuffed by the police. During cross-examination, the appellant admitted swallowing several capsules in Argentina. The trial judge, however, found the appellant had failed to cast any reasonable doubt on the prosecution's case or rebut the presumption of trafficking under s. 37(da) of the Act. He was thus found guilty, convicted and sentenced to death. The appellant appealed and submitted that the trial judge erred in not making a finding that s. 21(6) of the Act applied. It was also the appellant's case that the drugs were not destined for Malaysia, as he was on transit to Singapore, and so were the drugs. The other grounds advanced by the appellant were (i) that there was a lack of judicial appreciation of the defence that the appellant was in transit to Singapore and that he was not trafficking in dangerous drugs in Malaysia and (ii) the prosecution had failed to call the taxi driver thereby giving rise to a presumption of adverse inference under s. 114(g) of the Evidence Act 1950.

Held (dismissing the appeal; affirming conviction and sentence)

Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) The trial judge's finding that the appellant was not a transit passenger was correct. Judicial appreciation and reception of evidence required that the oral evidence be critically tested against the whole of the other evidence and circumstances of the case. It includes, but is not limited to, identifying the nature and quality of evidence, assigning such weight to it as a trier of facts deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses (*Boonsom Boonyanit v. Adorna Properties Sdn Bhd*, refd; *Lee Ing Chin v. Gan Yook Chin*, refd). The trial judge had undertaken that process. (para 18)

(2) The trial judge had taken into consideration the meaning of 'in transit' as defined in s. 2 of the Act. The facts showed that the appellant had checked out of the immigration counter and boarded a taxi to the city. He was arrested in the city. There was no error on the part of the trial judge on the application of s. 21(6) of the Act and there was no sufficient reason to merit appellate interference on this ground. (paras 22 & 23)

(3) Traceability or the availability of a witness could not be a ground for the invocation of s. 114(g). The prosecution was not bound to call all the witnesses involved in a particular case. Only the failure to call material witnesses who are necessary to unfold the narrative of the prosecution's case will attract the invocation of the said provision. The evidence of the taxi driver, if called in this instant case, or the failure to call him, did not affect the prosecution's case against the appellant. He was not a material witness (*Chia Leong Foo v. PP*, refd). Thus, there was no merit in this appeal. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh di Mahkamah Tinggi atas kesalahan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Perayu, seorang warganegara Peru yang disyaki pengedar dadah, tiba di KLIA pada awal pagi 15 Mei 2007. Perayu dilihat menaiki teksi dan telah diikuti SP1 dan pasukannya. Di Jalan Sultan, Kuala Lumpur, teksi telah berhenti dan SP1 dan pasukannya menangkap perayu. Apabila perayu pertama kali diperiksa, tiada apa-apa bahan yang boleh menunjukkan perayu bersalah dijumpai. Perayu kemudiannya dibawa ke Hospital Kuala Lumpur untuk x-ray dan keputusan menunjukkan terdapat beberapa kapsul di dalam perut perayu. Perayu ditahan supaya kapsul-kapsul tersebut dapat dikeluarkan dari badan perayu. Secara keseluruhannya 114 bungkusan kecil dikumpulkan dan dianalisa oleh ahli kimia kerajaan (SP5) dan didapati mengandungi 714 gram kokain. Menurut perayu, beliau telah berhenti transit di KLIA dan telah mengambil teksi untuk melihat menara kembar KLCC. Selepas ditunjuk menara kembar tersebut, perayu berhujah bahawa pemandu teksi telah meminta RM200 lagi untuk pergi balik ke lapangan terbang. Perayu kemudiannya telah keluar dari teksi di mana beliau ditahan dan digari oleh pihak polis. Semasa pemeriksaan balas, perayu mengaku bahawa beliau telah menelan beberapa kapsul di Argentina. Hakim perbicaraan, walau bagaimanapun, mendapati bahawa perayu telah gagal menimbulkan sebarang keraguan yang munasabah ke atas kes pendakwaan atau mematahkan kebarangkalian anggapan pengedaran di bawah s. 37(da) Akta. Perayu dengan itu didapati bersalah, disabit dan dihukum mati. Perayu merayu dan berhujah bahawa hakim perbicaraan telah khilaf apabila tidak membuat dapatan bahawa s. 21(6) Akta terpakai kepada kes ini. Ia juga adalah kes perayu bahawa dadah-dadah tersebut bukan untuk pengedaran di

Malaysia kerana beliau, dan begitu juga dadah-dadah tersebut, hanya transit ke Singapura. Alasan-alasan lain yang dikemukakan oleh perayu adalah (i) bahawa terdapat kekurangan penilaian kehakiman mengenai pembelaan bahawa perayu hanya transit ke Singapura dan tidak mengedar dadah berbahaya di Malaysia dan (ii) pihak pendakwaan gagal memanggil pemandu teksi dan ini telah membangkitkan anggapan inferens memudaratkan di bawah s. 114(g) Akta Keterangan 1950.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Dapatan hakim perbicaraan bahawa perayu bukan penumpang transit adalah betul. Penilaian kehakiman dan penerimaan keterangan memerlukan keterangan lisan diuji secara kritikal terhadap keterangan lain secara keseluruhan dan mengambil kira keadaan-keadaan kes. Ia termasuk, tetapi tidak terhad kepada, mengenal pasti sifat dan kualiti keterangan, memberi keberatan kepadanya mengikut apa yang difikirkan sesuai oleh pengadil fakta, menguji kredibiliti keterangan lisan terhadap dokumen-dokumen semasa serta kebarangkalian-kebarangkalian kes dan juga menilai tingkah laku saksi-saksi (*Boonsom Boonyanit v. Adorna Properties Sdn Bhd*, dirujuk; *Lee Ing Chin v. Gan Yook Chin*, dirujuk). Hakim perbicaraan telah menggunakan proses itu.

(2) Hakim perbicaraan telah mengambil dalam pertimbangan maksud 'in transit' seperti yang ditakrifkan di dalam s. 2 Akta. Fakta-fakta menunjukkan bahawa perayu telah melalui kaunter imigresen dan menaiki teksi ke arah kotaraya. Beliau ditangkap di tengah-tengah kota. Hakim perbicaraan tidak salah mengenai penggunaan s. 21(6) Akta dan tiada sebab yang memadai untuk menyokong campurtangan rayuan atas alasan ini.

(3) Pengesanan atau ketersediaan saksi tidak boleh menjadi alasan bagi pengenaan s. 114(g). Pihak pendakwaan tidak terikat untuk memanggil semua saksi-saksi yang terlibat di dalam kes tertentu. Hanya kegagalan memanggil saksi-saksi material yang diperlukan untuk mendedahkan kes pendakwaan akan menarik peruntukan tersebut. Keterangan pemandu teksi, jika dipanggil di dalam kes ini atau kegagalan memanggilnya tidak menjejaskan

A kes pendakwaan terhadap perayu. Beliau bukanlah saksi material. (*Chia Leong Foo v. PP*, dirujuk). Oleh itu, tiada merit di dalam rayuan ini.

Case(s) referred to:

B *Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA* ***(refd)***
Chia Leong Foo v. PP [2000] 6 MLJ 705 ***(refd)***
Khoon Chye Hin v. PP [1961] 1 LNS 41 ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221
C *SC* ***(refd)***
PP v. Jorge Enrique Pellon Tellon [1998] 4 CLJ 278 CA ***(dist)***
R v. Asfaw [2008] All ER (D) 274 ***(refd)***
R v. Uxbridge Magistrates' Court, ex parte Adimi [2001] QB 667 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

D **Legislation referred to:**
Dangerous Drugs Act 1952, ss. 2, 21(6), 37(da), 39B(1)(a)
Evidence Act 1950, s. 114(g)

For the appellant - Mohd Firuz Jaffril; M/s Firuz Jaffril, Aidil & Zarina
For the respondent - Shoba Venu Gobal DPP
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[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-4-2009]

Reported by Suhainah Wahiduddin

F

JUDGMENT

Balia Yusof Wahi JCA:

Background

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[1] The appellant was charged in the Kuala Lumpur High Court under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the case, the appellant was convicted and sentenced to death. Hence, this appeal.

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The Charge

[2] The charge against the appellant reads:

> Bahawa kamu pada 15 Mei 2007, lebih kurang jam 7.30 pagi di
I tepi Jalan Sultan, dalam daerah Dang Wangi, Kuala Lumpur Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu 714 gram kokain. Oleh yang demikian kamu telah melakukan satu

kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39(2) Akta yang sama.

The Prosecution's Case

[3] In the early morning of 15 May 2007 Chief Inspector Mohd Husni bin Manaf (SP1) from the Jabatan Narkotik Ibu Pejabat Daerah Polis Selangor received information that a Peruvian by the name of Amasifuen Tello Reyes, suspected to be a drug dealer, would arrive at KLIA *via* flight MH 0202 from Buenos Aires.

[4] At 4am SP1 and his team proceeded to the KLIA. At KLIA, the team headed by SP1 observed the Bahagian Kemasukan Penumpang Antarabangsa located at level 3 KLIA while two other teams observed the sorrounding area.

[5] MH 0202 landed at KLIA at about 5.40am, and with the assistance of the KLIA Immigration Officer, SP1 managed to identify the appellant. SP1 and his team saw the appellant exiting from the immigration checkout counter at 6am heading towards the taxi counter. The appellant then boarded a taxi to Kuala Lumpur city center. He was followed by SP1 and his team.

[6] The appellant was seen in the taxi until Jalan Sultan, Kuala Lumpur where the taxi was stopped and SP1 and his team arrested the appellant.

[7] At the time of his arrest the appellant was wearing a blue jacket with a waist pouch and he was also carrying a sling bag. When the appellant was first searched, nothing incriminating was found. The appellant was then brought to Balai Polis Tun H S Lee. Among the personal belongings that were found with him were his passport (P6), flight ticket (P7) and a boarding pass (P8);

[8] From Balai Polis Tun H S Lee, the appellant was brought to the Hospital Kuala Lumpur to be x-rayed. The x-ray result showed several capsules in the appellant's stomach. The appellant was detained at Wad Pembedahan 11 in order for the capsules to be expelled from the appellant's body.

[9] Police personnel were put on 24 hours guard from 15 May 2007 to 19 May 2007 to observe the appellant passing motion. Altogether 114 small packets were collected and handed over to SP1. The investigating officer, SP9 later sent these capsules to the

Government Chemist (SP5) who analysed all the same and found them to contain 714 grammes of cocaine. SP5 returned the exhibits to SP9 who later handed it over to SP4, the Store Keeper at the Dang Wangi Police Station.

[10] At the end of the prosecution's case, the learned trial judge found a *prima facie* case had been established and called for the appellant to enter upon his defence.

The Defence

[11] The appellant gave his evidence on oath. In his evidence, the appellant stated that he arrived at KLIA at about 5.20am on 15 May 2007 enroute to Singapore from Argentina. He stopped at KLIA on transit and his boarding pass showed that his flight to Singapore is at 8.20am the same day. He took a taxi to Kuala Lumpur in order to see the KLCC twin towers. He was shown the twin towers after which he asked the taxi driver to send him back to the KLIA. However the taxi driver went to a small narrow road and demanded another RM200 to go back to the airport. He then came out of the taxi and after walking for about 2 meters from the taxi he was arrested and handcuffed by the police and brought to a police station.

[12] During cross-examination, the appellant admitted swallowing several capsules in Argentina and came to Malaysia. Two gentlemen approached him and brought him to a hotel and asked him to swallow those capsules.

[13] The appellant did not call any other witness.

[14] The learned trial judge found the appellant had failed to cast any reasonable doubt on the prosecution's case and rebut the presumption of trafficking under s. 37(da) of the Act. He was found guilty, convicted and sentenced to death.

The Appeal

[15] Before us, two broad grounds were advanced by the appellant namely:

(i) lack of judicial appreciation of the defence that the appellant was in transit to Singapore and he is not trafficking in dangerous drugs in Malaysia, and

(ii) the prosecution's failure to call the taxi driver giving rise to presumption under s. 114(g) of the Evidence Act 1950.

[16] The defence of the appellant was that he was a transit passenger to Singapore. Learned counsel for the appellant submitted the learned trial judge failed to appreciate that the appellant was such a passenger. His disembarkation card was not produced. The appellant was sightseeing in the city and not a trafficker in drugs.

[17] We found this argument untenable. We agree with the finding of the learned trial judge that the appellant was not a transit passenger. At p. 110 of the appeal record, the learned trial judge gave his reasons for so holding. He states:

> Mahkamah memutuskan tertuduh bukanlah penumpang transit atas alasan-alasan berikut:
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> i. Masa yang singkat antara ketibaan di KLIA dan masa untuk berlepas ke Singapura adalah tidak lojik untuk seseorang mengambil teksi dengan tambang RM150 lebih tidak syak perjalanan adalah jauh, atau tidak bertanya berapa lama perjalanan hanya agak KLCC itu dekat. Lebih menjadi tidak lojik lagi untuk tertuduh yang menelan 114 ketulan dengan misi yang bahaya dan kritikal boleh memilih untuk makan angin.
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> ii. Tertuduh sepatutnya turun daripada teksi setelah perjalanan berpanjangan lebih dari 30 minit jika benar beliau tidak mengetahui jarak KLCC. Setiap orang yang waras akan mengetahui masa untuk balik semula ke KLIA akan lebih lama apabila kenderaan lebih banyak di waktu siang nanti. Adakah lojik untuk tertuduh berdalih dengan tambahan bayaran teksi RM200.00 dan sanggup turun dari teksi untuk mendapatkan teksi yang lebih murah tambangnya.
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> iii. Tertuduh juga melahirkan rasa takut dengan pemandu teksi yang sentiasa melihat kepada beliau melalui cermin belakang atas alasan di negaranya pemandu teksi sering merompak penumpang. Jika begitu alasannya kenapa perlu tertuduh bersiar-siar waktu subuh begitu.
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> iv. Mahkamah tidak dapat menerima cerita tertuduh sebagai benar dan tidak masuk akal untuk seseorang mempunyai misi yang penting diupah dengan tambang tiket mahal dari Argentina semata-mata untuk membawa dadah tetapi gagal melaksanakan misinya atas alasan yang remeh iaitu untuk melihat KLCC dan berkira dengan tambang teksi.

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v. Mengapa pula perlu tertuduh menukar duit Ringgit Malaysia sebanyak RM1030.00 jika hanya untuk tambang melihat bangunan KLCC yang kononnya tertuduh katakan berdekatan sahaja. Lebih tidak masuk akal apabila berkira bila tambang teksi dinaikkan sedikit dibandingkan dengan wang yang ada dan misi yang amat penting.

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vi. Peguambela semasa soal balas SP1 telah mencadangkan bahawa tertuduh mengambil teksi untuk pusing berdekatan KLIA tetapi semasa pembelaan telah menukar cerita menaiki teksi untuk melihat menara berkembar KLCC pula ini pun boleh dikatakan baru terlintas difikiran 'after thought'.

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[18] In coming to the said conclusion, the learned trial judge considered and appreciated fully the evidence before the court. Judicial appreciation and reception of evidence requires that the oral evidence be critically tested against the whole of the other

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evidence and the circumstances of the case. It includes, but is not limited to, identifying the nature and quality of evidence, assigning such weight to it as a trier of facts deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour

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of witnesses. (*Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17, *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119, *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19).

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[19] We are satisfied that the learned trial judge has undertaken that process.

[20] Learned counsel for the appellant further submitted that the trial judge erred in not making a finding that s. 21(6) of the Act

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applied. The appellant could only be guilty of an offence under the said section as the drugs were not destined for Malaysia. The appellant was on transit to Singapore and so were the drugs. We do not find any merit in this argument.

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[21] We have perused the appeal record and in particular the judgment at pp. 104-124 of the same. We agree with the learned trial judge's finding on the application of s. 21(6) of the Act after having taken into consideration the meaning of 'in transit' as defined in s. 2 of the same. At pp. 120-121 of the appeal record

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the learned trial judge opined:

> Peruntukan seksyen 21(6) ini mesti dilihat pada kedudukan mana tertuduh itu berada di lapangan terbang. Adakah melepasi pemeriksaan Imigresen atau belum. Saya berpendapat sebaik sahaja tertuduh menyerahkan pasportnya di kaunter Imigresen Malaysia di KLIA maka tertuduh berhajat untuk memasuki Malaysia dan tidak lagi sebagai penumpang transit. Sama ada hendak pusing-pusing dengan teksi berdekatan atau tidak ianya bukan lagi memberi status penumpang transit. Di mana sahaja di lapangan terbang antarabangsa di seluruh dunia penumpang boleh berada di dalam kawasan transit selagi tidak mengemukakan pasport ke pihak Imigresen untuk dicop masuk secara sah ke dalam Negara itu.

[22] We are unanimously in agreement with those words. We also agree that the instant appeal is clearly distinguishable from the case of *PP v. Jorge Enrique Pellon Tellon* [1998] 4 CLJ 278. The appellant had checked out of the immigration counter and boarded a taxi to the city. He was arrested in the city. The learned trial judge also found support in so finding upon relying on an authority from a Hong Kong court defining transit passenger as:

> A transit passenger is a person who remains on what is known as the "air side" of the airport and does not seek to enter Hong Kong: when the Appellant presented the passport he was seeking to land as contemplated by the Immigration Ordinance Cap 115. (*HKSAR v. Sthapak, Rakes Kumar*, HCMA 1180/2004 on appeal from STCC 4779 OF 2004).

(See also: *R v. Asfaw* [2008] All ER (D) 274, *R v. Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667)

[23] We find no error on the part of the learned trial judge on the application of s. 21(6) of the Act and we find no sufficient reason to merit appellate interference on this ground.

[24] On the issue of s. 114(g) of the Evidence Act 1950, it was submitted that the non-calling of the taxi driver as a prosecution's witness gave rise to an adverse presumption against the prosecution. Before us it was contended that the taxi and the taxi driver could easily be traced and there was no reason why he could not be called by the prosecution. In our view, traceability or the availability of a witness cannot be a ground for the invocation of s. 114(g). The prosecution is not bound to call all the witnesses involved in a particular case. Only the failure to call

material witnesses who are necessary to unfold the narrative of the prosecution's case will attract the invocation of the said provision. The evidence of the taxi driver, if called in this instant case or the failure to call him did not in our view affect the prosecution's case against the appellant. He was not a material witness. (See: *Chia Leong Foo v. PP* [2000] 6 MLJ 705, *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, *Khoon Chye Hin v. PP* [1961] 1 LNS 41).

[25] We do not find any merit in this appeal and accordingly the appeal is hereby dismissed. The conviction and sentence by the learned trial judge is affirmed.